IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Joint Stock Company State Savings Bank of Ukraine (a/k/a JSC Oschadbank), Petitioner, v. The Russian Federation, Respondent.	CIVIL ACTION NO. 1:23-cv-00764 (ACR)

RESPONDENT RUSSIAN FEDERATION'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Cases

Statutes

Treaties

Publications and other Authorities

PRELIMINARY STATEMENT

The Russian Federation ("RF") moves to stay this action pending the French Proceedings to set aside the $1.1 billion arbitral Award (ECF 1-2), dated November 26, 2018 ("Award"), which Petitioner JSC Oschadbank ("Oschadbank") is attempting to have recognized. This stay would also permit the Court to benefit from the resolution of the appeal of *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023), at D.C. Cir., Case No. 23-7038, and two related cases, which concern key FSIA issues disputed here. Courts routinely grant stays in the FSIA §1605(a) context under their inherent authority based on traditional standards,[1] as well as the *Europcar* factors.[2]

Termorio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 930 (D.C. Cir. 2007) bars recognizing an award that has been set aside by the foreign court exercising primary jurisdiction over the arbitration unless the set-aside decision is "repugnant to fundamental notions of what is decent and just." Based on this precedent, the Court may wish to first hold a hearing on the Motion to Stay, before deciding whether to hear the Motion to Dismiss before the French Proceedings conclude. This will likely occur in less than two years.

First, a stay is warranted under traditional standards, because judicial economy will be served, since this Court will not have to expend any resources if the French Proceedings set aside the Award, effectively rendering this proceeding moot. The balance of harms favors a stay because

[1] *See e.g. CC/Devas (Mauritius) Ltd. v. Republic of India*, 2022 U.S. Dist. LEXIS 53416 (D.D.C. March 24, 2022) (Lamberth, J.); *Cube Infrastructure Fund Sicav v. Kingdom of Spain*, 2021 U.S. Dist. LEXIS 256207, *9 (D.D.C. May 17, 2021) (Sullivan, J.); *Infrared Envtl. Infrastructure GP Ltd. v. Kingdom of Spain*, 2021 U.S. Dist. LEXIS 120489 (D.D.C. June 29, 2021) (Bates, J).

[2] *See e.g. CC/Devas,* 2022 U.S. Dist. LEXIS 53416 at *13; *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, 2021 U.S. Dist. LEXIS 63261, at *8 (D.D.C. Mar. 31, 2021) (Nichols, J.).

the RF is a sovereign entitled to protection from unnecessary burden under the FSIA. It should not have to litigate the Award in two separate forums, while Oschadbank suffers no harm pending the French Proceedings' conclusion. Further, if the Award is prematurely enforced, but later set aside in France, the RF will be burdened by having to reverse enforcement and recover assets that may have been seized.

Second, alternatively, a stay is warranted under the *Europcar* factors based on judicial economy, the balance of harms, and the difficulties which may arise if the Award is recognized here, but later set aside in France, as described above. Also, comity is best served by allowing the courts in France, Oschadbank's selected jurisdiction, to conclude the set-aside proceedings, which are integral to the investor-state dispute resolution process.

If the stay is granted, the RF suggests filing status reports every 90 days.

I. BACKGROUND[3]

A. The Arbitration

On January 16, 2016, Oschadbank initiated arbitration in France based upon the 1998 Russian-Ukrainian Bilateral Investment Treaty ("BIT") (ECF 1-3), which entered into force in 2000. The BIT applied only to investments made (i) by an investor of one state in the territory of the other, Art. 1(1); (ii) in conformity with the host state's laws, *id.*; and (iii) "starting from" January 1, 1992, Art. 12, *i.e.,* after the Soviet Union's dissolution.

On August 19, 2016, following a procedural teleconference between Oschadbank and the

[3] Unless otherwise stated, all emphases are added, and all citations, quotation marks, footnotes, ellipses, and brackets omitted. Exhibits are attached to the Thomas Sullivan declaration as (**Ex.** []) and Andrea Pinna Declaration as (**AP Ex.** []).

Tribunal and comments from Oschadbank on the draft-Procedural Order No. 1 which had the place of arbitration as Paris, the Tribunal issued Procedural Order No. 1 setting the place of arbitration as Paris. *See* July 25, 2016, Oschadbank email, **Ex. 1**; July 30, 2016, Oschadbank email with draft-Procedural Order No. 1, **Ex. 2**; and, August 19, 2016, Procedural Order No. 1, **Ex. 3**.

On August 26, 2016, Oschadbank submitted its Statement of Claim to the Tribunal. However, the RF did not participate in the arbitration on the basis that it had not offered to arbitrate claims involving Oschadbank's assets which were not investments made in the RF, and if they occurred, they were made prior to accession of Crimea to the RF, and they were not made in conformity with RF legislation. *See* December 24, 2015, RF Letter, **Ex. 4**. On November 26, 2018, the Tribunal issued the Award. Thereafter, the RF commenced two proceedings in France to set aside the Award ("French Proceedings").

B. The French Set-Aside Action

On February 19, 2019, pursuant to the French Code of Civil Procedure ("FCCP"), Art. 1520, the RF initiated set-aside proceedings before the Paris Court of Appeal ("Paris COA") against the Award ("Set-Aside Action"). The RF put forward several grounds for annulment of the Award including because the Tribunal wrongly determined it had jurisdiction. *See* Pinna Dec., ¶4; February 28, 2019 "Declaration De Saisine" and certified translation, **AP Ex. 1**. On July 18, 2019, the RF made its first submission; Oschadbank made its first submission on January 16, 2020. *See* Pinna Dec., ¶5. Thereafter, both sides made additional submissions, with the RF's final submission on February 4, 2021 setting forth notably that the RF did not offer to arbitrate with Oschadbank, given, *inter alia*: **(1)** the BIT does not apply to investments made before January 1, 1992 (*ratione temporis*), Art. 12; **(2)** the BIT does not apply over Crimea because of the existence

of a territorial dispute between the RF and Ukraine (*ratione loci*), Arts. 1(1), 1(2), and 1(4); and **(3)** Oschadbank's alleged investment was made in Crimea prior to its accession to the RF in March 2014 (*ratione materiae*), Arts. 1(1) and 9(1). *See* Pinna Dec., ¶6; February 4, 2021, RF 4th (Final) Submission, **AP Ex. 2**. The Paris COA reviewed the jurisdiction of the arbitral tribunal *de novo*, *i.e.,* it exercised the power to (re)examine all elements in fact and in law pertaining to the consent to arbitrate. *See* Pinna Dec., ¶7. The RF's original Motion to Dismiss (ECF 21) and contemporaneously filed renewed Motion to Dismiss raise many of these objections.

a) The Paris COA Set Aside the Award Within Seven Weeks of Completion of Submissions

On March 30, 2021, the Paris COA set aside the Award, upholding the first set-aside ground put forward by the RF that the Tribunal lacked jurisdiction to hear a dispute over investments made prior to January 1, 1992, under Art. 12 of the BIT. *See* Pinna Dec., ¶8; Set Aside Judgement, ECF 1-4, ¶101 ("the temporal condition laid down in Article 12 of the [BIT] containing the offer of arbitration has not been satisfied, so the Arbitration Tribunal has wrongly declared itself competent to hear the dispute"). The Paris COA did not examine the other grounds for annulment put forward by the RF.

b) The French Court of Cassation Decision and Remand to the Paris COA

On April 19, 2021, Oschadbank commenced an appeal to the Court of Cassation, the highest court in France ("Cassation Court"), with its initial submission made on October 15, 2021. On February 14, 2022, the RF filed its Statement of Defense, with its final filing on October 11, 2022. Pinna Dec., ¶9. Just five weeks later, on December 7, 2022, the Cassation Court reversed the Paris COA without substantive analysis, holding: (1) Articles 1 and 9 on their face contained

no temporal restrictions, and (2) Article 12's temporal limitation of January 1, 1992, was not related to jurisdiction, but to the merits, and was outside the scope of review by the French set-aside judge, ("Cassation Judgment"). The Cassation Court held that concerning *ratione temporis* jurisdiction, the Paris COA was only required to ascertain that the dispute had arisen after the BIT entered into force in 2000. The Cassation Court remanded the case to the Paris COA for consideration by a different set of judges. *See* Pinna Dec., ¶10; Cassation Judgment, ECF 1-5, ¶¶ 6, 13.

c) The Renewed Set-Aside Action

On March 8, 2024, the RF "seized" the Paris COA to renew the Set-Aside Action. *See* March 25, 2024 "*Declaration De Saisine,"* and certified translation; **AP Ex. 3**. The Paris COA will be asked to decide on all set-aside grounds put forward by the RF, including the lack of jurisdiction ground *ratione temporis* (Art. 12 BIT). The Paris COA is not bound to comply with the prior Cassation Judgment regarding jurisdiction and is allowed to make its own determination *de novo* regarding jurisdiction based upon Article 1520 1° FCCP. *See* Pinna Dec., ¶11.

The RF's first submission is due to be filed on July 8, 2024. The Paris COA has not yet issued a procedural calendar and has not yet fixed a date for the final hearing in these proceedings. Under Art. 1037-1 of the FCCP, these proceedings before the Paris COA are subject to an expedited procedure, which means that they may take a shorter time than the initial set aside proceedings, i.e. less than 25 months. *See* Pinna Dec., ¶¶12-13. If the Paris COA sets aside the Award a second time, Oschadbank may appeal before the Cassation Court. If the Paris COA declines to set aside the Award, the RF may appeal before the Cassation Court. *See* Pinna Dec., ¶14.

C. The French Revision Action

On August 19, 2019, the RF filed a "*Révision*" application ("Revision Action") to revoke the Award with the Tribunal on the basis of Article 1502 FCCP, arguing that Oschadbank concealed to the Tribunal the date at which the alleged investment was made, which the RF only learned by gaining access to archives in Kiev and obtaining decisive documents showing that the alleged investment was made prior to January 1, 1992, and therefore not protected by the BIT. *See* Pinna Dec., ¶15.

1. The Tribunal's Decision

On December 23, 2019, the Tribunal decided on its own motion to stay the Revision Action pending resolution of the French Set-Aside Action. After the Cassation Court's ruling on December 7, 2022, Oschadbank applied to the Tribunal requesting the dismissal of the *Révision* application. After additional submissions were completed by April 3, 2023, on December 11, 2023, the Tribunal dismissed the Revision application based on the Cassation Court decision, finding that any alleged concealment did not implicate its jurisdiction. *Id.*, ¶16; Revision Decision, **AP Ex. 4.**

2. The Proceedings to Set Aside the Tribunal's Denial of the Revision Proceeding ("Revision Set-Aside Action")

On March 8, 2024, the RF initiated set-aside proceedings before the Paris Court against the denial of its Revision application ("Revision Set-Aside Action"). *Id.*, ¶17; March 25, 2024 "Declaration De Saisine," **AP Ex. 5**. The Paris COA will review the Revision Decision based upon Article 1520 3° FCCP regarding the Tribunal having not complied with the mandate conferred upon it and Article 1520 4° FCCP regarding the Tribunal violating the RF's procedural due process rights, because*, inter alia*, the Tribunal disregarded the RF's request for hearing, and issued the Revision

Decision without holding a hearing. *Id.* The RF's detailed submission is due to be filed on August 8, 2024. The Paris COA has not yet issued a procedural calendar and has not yet fixed a date for the final hearing in these proceedings. However, there is nothing to suggest that the duration will differ considerably from the first set-aside proceeding, i.e., 25 months. *Id.,* ¶18. In the Revision Set-Aside Action, the RF is seeking the annulment of the Revision Decision. If the Revision Decision is annulled, the RF will be able to reinstate the Revision Action. *Id.,* ¶19.

II. THE PRE-MOTION CONFERENCE

At the May 7, 2024, Pre-motion conference, the Court raised various issues, some addressed here, and others addressed in the renewed Motion to Dismiss. *See* Pre-motion Trans., **Ex. 5.** The RF does not intend to argue non-FSIA jurisdictional issues but is merely responding to the Court's concerns.

A. International Law Applies to Interpreting the BIT

The Court inquired whether international law would apply to this case. *See* Pre-Motion Transcript, at 48-50. In this regard, the BIT provides "territory" is defined as "the territory of Ukraine or ***the territory of the Russian Federation,*** as well as their respective exclusive economic zone ["EEZ"] and continental shelf ["CS"], ***as defined in conformity with international law.***" *Id*., Art. 1(4). Further, in interpreting international treaties, such as the BIT, the Vienna Convention on the Law of Treaties ("VCLT") is "as an authoritative guide to the customary international law of treaties" and "a codification of customary international law." *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001). *See United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013) (citing VCLT as authority on "[b]asic principles of treaty interpretation"). VCLT Art. 31, General rule of interpretation, provides, *inter alia,* that "[t]here shall be taken into account, together

with the context … any relevant rules of international law applicable in the relations between the parties." *Id.*, Art. 31 (3)(c). Sources of "competent proof of the content of customary international law" consist of "international conventions," "custom," "generalized principles of law," and "judicial decisions… and teachings." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 175 (2d Cir. 2009) (*quoting* International Court of Justice Statute, art. 38(1), June 26, 1945). The renewed Motion to Dismiss relies substantially on international law set forth in the Nouvel BIT expert report.

B. The Court Is Not Permitted to Recognize an Annulled Award Unless It Finds the Foreign Decision Setting Aside the Award "Repugnant"

The Court inquired whether any D.C. Circuit decision ***binds*** this Court to follow a decision setting aside an arbitration award by the court exercising primary jurisdiction over the arbitration. *See* Pre-Motion Trans., at 7. While no decision binds this Court, *Termorio* bars recognizing an award unless the court finds the set-aside decision is "repugnant to fundamental notions of what is decent and just." *Id.*, at 939. As such, "[p]ursuant to [Art. V(1)(e) of the New York Convention], a secondary Contracting State normally may not enforce an arbitration award that has been lawfully set aside by a 'competent authority' in the primary Contracting State." *Id.*, at 935.[4] Enforcing an award which has been set aside "would seriously undermine a principal precept of the New York Convention: an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made." *Id.* As *Termorio* recognized, "undesirable consequences" would follow from

[4] Art. V(1)(e) provides: "Recognition and enforcement of the award may be refused … [if the] award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." *See also* 9 U.S.C. §207 ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the … [New York] Convention").

enforcement of the Award if set-aside in France. "[U]nder the Convention [this] would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary with enforcement actions from country to country until a court is found, if any, which grants the enforcement." *Id.,* at 936. *See Baker Marine, Ltd. v. Chevron, Ltd.,* 191 F.3d 194, 197 n. 2 (2d Cir. 1999) (same).

Based on this reasoning, *Termorio* held a court may not enforce an award that has been set aside unless it finds the set-aside decision "is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.'" *Termorio* at 938. *See also Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petro. Corp.,* 40 F.4th 56, 67 (2d Cir. 2022) (same). It is unlikely that this Court will find a decision of the French courts "repugnant."

III. ARGUMENT

The RF moves to stay these proceedings pending resolution of the French Proceedings, either of which may set aside the Award, effectively mooting this case. *CC/Devas,* which granted a stay pending the conclusion of Dutch set-aside proceedings, is illustrative of how courts consider stays involving the FSIA arbitration exception. As in *CC/Devas*, the RF "claims that it has not waived its sovereign immunity, which would divest this Court of jurisdiction over this dispute." *Id.,* *7. In this exact circumstance, "courts in this district have held that staying a dispute about a foreign arbitral award is the 'type of threshold, non-merits, non-jurisdictional question' that a court may decide before addressing its own jurisdiction." *Id.,* *8 (collecting cases granting stays to

sovereigns).[5]

A. THE COURT SHOULD STAY THIS PROCEEDING UNTIL THE FRENCH PROCEEDINGS ARE COMPLETED

1. The Court Should Exercise Its Inherent Authority to Stay This Matter Based on Traditional Standards

"A district court 'possesses inherent powers' stemming from 'the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *CC/Devas,* at *10 *quoting Dietz v. Bouldin*, 579 U.S. 40, 45 (2016). "The ability to stay litigation 'is incidental to' these inherent powers." *Id.*, *quoting Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "A court exercising its power to stay a case must 'weigh competing interests and maintain an even balance,'… between the court's interests in judicial economy and any possible hardship to the parties." *Id*., *11 *quoting Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 733–34 (D.C. Cir. 2012). The Court should exercise its inherent authority and grant a stay based on these traditional standards.

a) Judicial Economy Supports Granting a Stay

A stay will promote judicial economy, because the French proceedings may set aside the Award, effectively mooting this proceeding. "[F]ar from being at odds with the nature of arbitration confirmation proceedings, adjournments pending the completion of set-aside proceeding are an integral part of such proceedings." *CPConstruction Pioneers Baugesellschaft Anstalt v. Gov't of the Republic of Ghana*, 578 F. Supp. 2d 50, 54 (D.D.C. 2008).

[5] *See e.g. Cef Energia, B.V. v. Italian Republic*, 2020 U.S. Dist. LEXIS 130291, at *4 (D.D.C. July 23, 2020); *Novenergia II — Energy & Env't (SCA) v. Kingdom of Spain*, 2020 U.S. Dist. LEXIS 12794, at *2 (D.D.C. Jan. 27, 2020); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 38-39 (D.D.C. 2019 .

First, a stay promotes judicial economy, because, if an "'arbitration award [is] lawfully nullified by the country in which the award was made,' a party has 'no cause of action in the United States to seek enforcement of the award under either the FAA or the New York Convention.'" *CC/Devas* at *11, *quoting Termorio*, 487 F.3d at 930.[6] Here, the potential of the French Proceedings to effectively render the Award unenforceable here, "is a paradigm example of a case warranting a stay where the legal viability of claims may rest on determinations in another legal proceeding." *Id*. *See e.g.*, *Termorio* at 934 (refusing to enforce arbitral award which had been set aside by Colombian court); *Getma Int'l v. Republic of Guinea*, 191 F. Supp. 3d 43, 45, 55 (D.D.C. 2016) (staying enforcement proceedings pending foreign set-aside proceedings, and, after set-aside, refusing to enforce annulled award), *aff'd* 862 F.3d 45, 50 (D.C. Cir. 2017).

Second, a stay promotes judicial economy by avoiding "the difficulty of determining matters of foreign law currently being litigated in foreign courts." *CC/Devas,* *11 (granting stay). Here, the renewed Motion to Dismiss raises numerous matters concerning matters of international law under the BIT, including (a) whether the RF offered to arbitrate investments made in Crimea, absent mutual agreement it was RF territory for the purposes of the BIT (principle of contemporaneity), (b) Oschadbank's rejection of the RF's offer by denying Crimea was RF territory; and (c) Oschadbank's investment was made before the January 1, 1992 jurisdictional date. *See* Renewed Motion to Dismiss, at 15-18; Nouvelle BIT Legal Expert Report.

Third, judicial economy is promoted because the Court will not have to decide potentially complicated FSIA jurisdictional issues unless the French proceedings are unsuccessful. These

[6] *See also Cef Energia,* 2020 U.S. Dist. LEXIS 130291, *15 (granting stay; the interests of judicial economy are "especially strong where a [foreign] parallel proceeding is ongoing and when there is a possibility that the [arbitral] award will be set aside").

include whether (a) Russia's position that it made no offer to arbitrate this dispute is jurisdictional under FSIA; (b) there is a legal relationship involving commerce between the RF and Oschadbank as required under the New York Convention; and (c) the BIT is for the benefit of a "private party" as required under FSIA, §1605(a)(6), because Oschadbank is entirely owned by Ukraine. *See* Renewed Motion to Dismiss, p. 30.

Fourth, a stay conserves judicial resources, because "[i]f this Court were to affirm an award that [the parallel foreign proceeding] later annuls, '[m]ore expensive litigation involving more complex issues would result.'" *RREEF Infrastructure*, 2021 U.S. Dist. LEXIS 63261 (March 31, 2021, *8. *See Thai-Lao Lignite (Thail.) Co. v. Gov't of the Lao People's Democratic Republic*, 864 F.3d 172, 178-79 (2d Cir. 2017) (district court required to vacate recognition judgment after award was set aside by foreign court).

b) The Balance of Harms Favors a Stay

The hardship on the RF greatly outweighs any potential hardship to Oschadbank, favoring a stay.

First, "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990). Absent a stay, the RF will "undeniably be burdened by having to attack the validity of [an] arbitral award in two forums" simultaneously, where the primary jurisdiction is outside of the United States. *See CC/Devas* at *12 ("[T]he hardship to India to litigate those matters simultaneously suggest that the Court should exercise its inherent power to stay."); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 40 (D.D.C. 2019) (granting stay because Spain "will undeniably be burdened by having to attack the validity of the arbitral award in two forums").

Second, there is "very real harm" if a foreign State's assets are seized pursuant to enforcement of an arbitral award and the primary jurisdiction's courts later "determine[s] that the award was improper." *Getma Int'l v. Republic of Guinea*, 142 F.Supp.3d 110, 118 (D.D.C. 2015). Here, the RF "would 'undeniably be burdened' … if the [French] courts later set the awards aside, [if it would then] 'hav[e] to recover assets seized' as a result of this Court's confirmation." CC/Devas, at *12. *See also RREEF Infrastructure*, 2021 U.S. Dist. LEXIS 63261, at *8 ("[I]f the Court were to confirm the award now, Spain could face the arduous task of trying to recover seized assets if its annulment application before the ICSID proves successful."); *Novenergia II – Energy & Env't (SCA),* 2020 U.S. Dist. LEXIS 12794, at *10 (D.D.C. Jan. 27, 2020) ("[T]he risk of premature enforcement could result in [a foreign State] trying to recover assets seized during this action if it were to prevail in the [set aside] proceedings."); *Masdar Solar*, 397 F. Supp. 3d at 40 (emphasizing the burden to a foreign State of "having to recover assets seized during this action should the annulment proceeding go its way").

Third, Oschadbank can assert no cognizable harm. The French proceedings are likely to conclude within 25 months. Oschadbank can hardly complain about the time which set-aside proceedings take in its chosen French jurisdiction. Moreover, Oschadbank has admittedly filed this proceeding outside the jurisdictional three-year period to recognize awards under 9 U.S.C. §207. *See* Petition, (ECF 1), ¶40.

2. The *Europcar* Factors Favor a Stay

In interpreting its inherent authority, some courts have considered factors under *Europcar Italia, S.P.A. v. Maiellano Tours*, 156 F.3d 310, 317 (2d Cir. 1998), addressing stays under the New York Convention, even though not applicable here, given the FSIA jurisdictional challenge.

In CC/Devas, at *18, while the Court recognized the New York Convention was not applicable due to the jurisdictional challenge, it found under its inherent authority that "[t]he *Europcar* factors similarly weigh in favor of a stay."

The *Europcar* factors are:

(1) the general objectives of arbitration--the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;
(2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;
(3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;
(4) the characteristics of the foreign proceedings including … whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity;
(5) a balance of the possible hardships to each of the parties … ;
(6) any other circumstances that could tend to shift the balance in favor of or against adjournment.

Europcar, 156 F.3d at 317-18. While not controlling,[7] these factors favor a stay as well.

First, the first *Europcar* factor is inapposite here. Unlike domestic commercial arbitrations such as in *Europcar*, under sections Chapter I, §§1-16 of the FAA, investor-state arbitrations under the New York Convention, as incorporated into Chapter II, §§201-208 of the FAA, are not designed to be, or, in practice, are not, expeditious, but are meant to encourage investment by providing neutral arbitration to investors. *See e.g., Republic of Ecuador v United States of America*, UNCITRAL, PCA Case No 2012-5, Award (29 September 2012), ¶201 (quoting the US

[7] *LLC SPC Stileks v. Republic of Mold.*, 985 F.3d 871 (2021) affirmed lifting of a stay under the *Europcar* factors because Moldova failed "to address the district court's concerns about further delay." *Id.*, at 880. However, the Circuit Court noted it "has yet to endorse the *Europcar* approach" and "doubt[ed] that a six-factor balancing [*Europcar*] test—enforced by appellate review—is consistent with the district court's 'broad discretion to stay proceedings as an incident to its power to control its own docket.'" *Id.* The RF agrees that the traditional factors should govern.

Statement of Defense) ("a principal rationale for investor-State dispute mechanisms, is to depoliticize investment disputes and permit neutral and binding arbitration between the State and the investor").[8] Such arbitration is typically heard by three-member tribunals and is complicated, protracted, and expensive. *See Primer on International Investment Treaties and Investor-State Dispute Settlement*, Columbia Center of Sustainable Investment, **Ex. 6**, at 6-8. "Investor-State Dispute Settlement ["ISDS"] … proceedings are generally opaque, secretive, and exclusive compared to the US and other domestic legal systems … the average ISDS proceeding costs around $13 million for the claimant and respondent combined, including tribunal costs. Complicated and high-stakes cases can cost more." *Id.*, at 5. Nothing in the New York Convention suggests that investor-state arbitration is to be expeditious.

In any case, a desire to resolve disputes expeditiously does not override the post-arbitral review process pending in the French Proceedings. In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), the Supreme Court stated, "[t]he legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate [and] ***therefore reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.***" *Id.*, at 217-21.

Oschadbank participated in drafting Procedural Order No. 1, setting the place of arbitration in France, thus agreeing to the post-arbitral review procedures available there. Given that Oschadbank agreed to these "arbitration procedures," the Court should favor a stay until the French

[8] *See also* Matthew Hodgson, "2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration" ("The mean duration of the proceedings with claimed amounts in excess of US1bn was approximately eight years.") *Id.* at p. 32. Accessible at: https://www.jus.uio.no/ior/english/people/aca/malcolml/22119000_021_02-03_s004_text.pdf.

proceedings are completed. *Getma Int'l v. Republic of Guinea,* 142 F. Supp. 3d at 114 (D.D.C. 2015) (granting stay until the set-aside proceedings in the seat of arbitration are completed, because the court "cannot . . . overlook agreed-upon arbitral procedures in favor of the enforcement of an arbitration award"); *CC/Devas*, *15 ("A stay in this dispute will allow this 'integral part' of the arbitration process to run its course.") Further, premature enforcement of the Award may result in even longer and more expensive litigation if the Award is set aside in France. *See Cube Infrastructure,* 2021 U.S. Dist. LEXIS 256207, *9 (granting stay: if the award is enforced "prematurely and is later annulled" there will "undoubtedly be litigation" to recover assets seized; and no hardship to petitioner who, if it prevails, can be compensated because the award includes interest).

Second, the second *Europcar* factor favors a stay, because it is expected that the Paris COA will rule on the current set-aside proceedings within 25 months. *See Getma Int'l,* 142 F. Supp. 3d at 115-16 (finding second *Europcar* factor favors a stay, because "the Court is not convinced at this juncture that the [post-arbitration review] will take more than two years to resolve the annulment proceeding"); *Jorf Lasfar Energy Co., S.C.A. v. AMCI Exp. Corp.,* 2005 U.S. Dist. LEXIS 34969, *8-9 (W.D. Pa. Dec. 22, 2005) (staying action because "[t]here is no evidence that the French court will fail to adequately review the arbitral award or partake in excessive delay in doing so. Rather, defendant reports that a decision is expected from the French court before the end of next year").

Third, the third *Europcar* factor favors a stay, because the French courts will *de novo* scrutinize the factual and legal jurisdictional issues before this Court. Under this factor, *CC/Devas* found the foreign court's "probing [*de novo*] standard of review supports granting a stay." *Id.*, *16.

See also Getma Int'l, 142 F. Supp. 3d at 116 (this factor favors a stay based upon "the possibility that the foreign proceeding at issue here will effectively set aside the dictates of the [a]ward").

Fourth, the fourth *Europcar* factor favors a stay based on the characteristics of the French Proceedings, because the RF commenced the Set-Aside and Revision Actions in 2019, years before Oschadbank brought this enforcement action. Deciding issues here before the conclusion of the "foreign set aside proceedings would disregard *Europcar's* focus on international comity." *Id*., *8. As emphasized in *Masdar Solar*:

> *Interests of comity..... are especially strong where a foreign parallel proceeding is ongoing..... and there is a possibility that the award will be set aside, since a court* ***may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings.***

397 F. Supp. 3d at 40 (granting stay). *See also Hulley Enters. v. Russian Fed'n,* 502 F. Supp. 3d 144, 158 (D.D.C. 2020) ("the interest of international comity and orderly litigation are best served by imposing a stay pending final judgment in the primary jurisdiction on a set-aside proceeding").

Fifth, the fifth *Europcar* factor favors a stay based upon the balance of hardships. "As explained above, [the RF] faces the potential hardship of litigating the same issues simultaneously in multiple forums. And any rulings in this Court could be undone if the [French] courts ultimately set aside the … [Award]. These potential hardships outweigh [Oschabank]'s concern that the litigation will be unduly delayed." *CC/Devas,* at *17. *See also Getma Int'l,* 142 F. Supp. 3d at 118 (this factor favors a stay, because "a premature confirmation and enforcement of the award would essentially eviscerate Guinea's bargained-for right to have the arbitral award reviewed by the [Common Court of Justice and Arbitration]"); *RREEF Infrastructure (G.P.) Ltd.*, 2021 U.S. Dist. LEXIS 63261, at *7-8 (granting a stay, because "[l]itigating essentially the same issues in

two separate forums is not in the interest of judicial economy"). In contrast, Oschadbank will suffer no harm, as explained above.

Finally, a stay is favored under the sixth *Europcar* factor, because the "[i]nterests of 'international comity and orderly litigation are best served by imposing a stay' pending final judgment in foreign set-aside proceedings." *CC/Devas*, at *18.

To sum up, "[t]he interests of judicial economy, international comity, and potential hardship to the parties militate toward granting a stay under the Court's inherent powers. The *Europcar* factors similarly weigh in favor of a stay." *CC/Devas,* at *18.

B. A Stay Will Likely Allow the Court to Benefit from the Circuit Court's Decision in the Consolidated *Blasket Appeal*

The Circuit Court in *Blasket* and two related appeals[9] heard arguments concerning disputes over whether Spain agreed to arbitrate intra-EU disputes with investors under the Energy Charter Treaty ("ECT") under §1605(a)(6), and whether merely signing the New York Convention constitutes an implicit waiver of immunity under §1605(a)(1). The day before the pre-motion conference, Oschadbank proposed, based "[u]pon further consideration" following the parties' conferral, a "compromise" to stay this proceeding pending resolution of the *Blasket* appeal. *See* May 6, 2024, Oschadbank Letter to the Court. The next day, Oschadbank backtracked from ***its*** compromise, even though the RF agreed. *See* Pre-Motion Conference Transcript, **Ex. 5**, at 27-29. Oschadbank's waffling aside, this Court will benefit from withholding its decision until the *Blasket*

[9] On April 20, 2023, the Circuit Court in *Blasket* ordered that cases *Nextera Energy Global Holdings B.V., et al v. Kingdom of Spain*, Case No. 23-7031 and *9REN Holding S.A.R.L. v. Kingdom of Spain*, Case No. 23-7032 be scheduled for oral argument on the same day and before the same panel. The oral argument was held on February 28, 2024.

panel rules.[10]

First, *Blasket* upheld Spain's position, holding that the existence of an agreement to arbitrate is subject to *de novo* review arising from an ECT arbitration governed by UNCITRAL Rules. In holding UNCITRAL Rules did not prevent *de novo* review of this issue, *Blasket* rejected deference to an arbitral tribunal on a threshold matter such as whether the parties had "enter[ed] into an agreement to arbitrate anything at all," as that would "effectively assume[] away the antecedent question of whether the parties could have agreed to do so in the first instance." 2023 U.S. Dist. LEXIS 54502 at *15. It then held there was no jurisdiction under the FSIA §1605(a)(6) arbitration exception, because Spain could not offer to arbitrate disputes with investors from other EU states under EU law. *Id.,* *10-*21.

The renewed Motion to Dismiss asserts that the FSIA §1605(a)(6) arbitration exception does not apply, because, *inter alia*, there was no agreement to arbitrate disputes with Oschadbank over its investments in Crimea under the BIT for numerous reasons, including (i) the RF did not offer to arbitrate investments made in Crimea, absent mutual agreement it was RF territory, (ii) Oschadbank rejected the RF's offer by denying Crimea was RF territory; and (iii) much of Oschadbank's investment was made before the January 1, 1992 jurisdictional date. *See* Renewed Motion to Dismiss, pp. 16-28. Oschadbank's Pre-Motion Letter (ECF 28) indicated that its

[10] Numerous courts stay proceeding pending an anticipated Circuit Court or Supreme Court decision which may dispose of a significant legal issue. *See Toren v. Fed. Republic of Ger.*, 2022 U.S. Dist. LEXIS 152674, *1-2 (D.D.C. Aug. 24, 2022) (noting that Court previously granted a stay in FSIA case "pending the Supreme Court's decision in a similar case concerning the application and scope of the expropriation exception"); *Peled v. Netanyahu*, 2017 U.S. Dist. LEXIS 231001, *6-7 (D.D.C. Oct. 16, 2017) ("upon balancing the competing interests of the parties, the Court finds that this case and the pending appeal in [another case] share overlapping similarities that tip the scales in favor of judicial economy sufficient to warrant a stay of the proceedings in this case").

Response to the Motion to Dismiss will argue that the Tribunal's decision is binding on the RF, presumably based on UNCITRAL Rules. The renewed Motion to Dismiss briefly discusses this forthcoming argument, *id.,* at n. 11, and the RF's Reply will address it in detail if raised in Oschadbank's Response. The Circuit Court's forthcoming ruling in *Blasket* may provide guidance on this issue.

Second, *Blasket* further held there was no jurisdiction under the FSIA waiver exception premised on merely signing the NY Convention. *See id.,* *21-*24. Oschadbank contends the RF waived immunity by signing the New York Convention. *See* Petition, ¶9. The renewed Motion to Dismiss contests this approach. *Id.,* at 37. The Circuit Court's forthcoming ruling in *Blasket* may decide whether merely signing the New York Convention constitutes implicit waiver under §1605(a)(1).

While the RF does not base its stay motion on the *Blasket* appeal, both Oschadbank and the RF have acknowledged that the Court may benefit from the Circuit Court's rulings on disputed FSIA issues.

CONCLUSION

For the foregoing reasons, the Court should stay this case until the conclusion of the French Proceedings.

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